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IN THE

Supreme Court of the United States

October Term, 1966

No. 350

REPUBLIC OF CUBA, BANCO PARA EL COMERCIO EXTERIOR DE CUBA and JAN SNOBL, Charge d'Affaires ad Interim of the Czechoslovak Socialist Republic,

Petitioners,

against

FLOTA MARITIMA BROWNING DE CUBA, S.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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July 14, 1966.

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FLOTA MARITIMA BROWNING DE CUBA, S.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Republic of Cuba, Banco Para el Comercio Exterior de Cuba and Dr. Jan Snobl, Charge d'Affaires ad Interim of the Czechoslovak Socialist Republic respectfully pray that a writ of certiorari issue to review the decrees of the United States Court of Appeals for the Fourth Circuit entered herein on June 24, 1966, affirming an order of the District Court for the District of Maryland entered September 25, 1965.

Opinions Below

The Court of Appeals wrote an opinion, not yet reported, a copy of which is reprinted as Appendix A *infra* at page 1a. The District Court wrote an opinion reported at 245 F. Supp. 205, a copy of which is reprinted as Appendix B *infra* at page 10a. Questions of jurisdiction, raised in the Court of Appeals and considered in its opinion, had

been the subject of an opinion of the District Court reported at 181 F. Supp. 301 at an earlier stage of the litigation and reprinted as Appendix C *infra* at page 21a. Questions of sovereign immunity related to those raised in the courts below had previously been considered by the District Court in an opinion reported at 218 F. Supp. 938, affirmed 335 F. 2d 619.

Jurisdiction

The decrees of the Court of Appeals were entered on June 24, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Is an agreement for the lease of a ship with options, exercisable by both parties, to convert the agreement to one of outright sale with rental payments applied to the purchase price, a maritime contract within admiralty jurisdiction?

2. Is a vessel which had been out of service for 23 months prior to its arrest, and which has been idle ever since, a dead ship, over which there is no admiralty jurisdiction?

3. Does Rule E(9)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims (formerly Admiralty Rule 12) permit the interlocutory sale of a vessel over its owner's objection:

a. when its owner has not sought its release because of its continuing claim of sovereign immunity?

b. as a sanction to coerce the owner to procure its release on bond?

c. when there are serious questions of the jurisdiction of the court, and if jurisdiction is lacking the marshal's sale would be void?

d. when the only *in rem* relief obtainable against the vessel is less than its scrap value, and no *in personam* relief is demanded against its owner?

e. when the sale of the vessel would be void, being in violation of the Cuban Assets Control Regulations, 31 C. F. R. § 515.101 *et seq.*, unless licensed, and no license had been obtained or applied for?

f. when the libelant permitted six years to elapse after arrest of the vessel before seeking its sale?

4. Does Rule E(7) of the Supplemental Rules (formerly Admiralty Rule 50), requiring the District Court to order the posting of security on a cross-libel "unless the court for cause shown shall otherwise direct", permit a motion for such security to be denied:

a. on the grounds of non-prejudicial delay in seeking such relief,

b. because the claimant of the arrested vessel continues, unsuccessfully, to claim sovereign immunity, and

c. because there are intervening libels?

5. Was the arrested vessel entitled to sovereign immunity, and if so, does the general appearance of a foreign sovereign as claimant of a vessel in an *in rem* admiralty suit constitute a waiver as to the arrested vessel of sovereign immunity either from jurisdiction or from execution?

6. Does the United States Marshal, having custody of a vessel arrested in an *in rem* admiralty suit, have responsibility to maintain the vessel?

Rules Involved

Supplemental Rules for Certain Admiralty and Maritime Claims:

> Rule E(7) SECURITY ON COUNTERCLAIM. Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.
>
> Rule E(9)(b) INTERLOCUTORY SALES. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to him, upon the giving of security in accordance with these rules.

Statement of the Case

On August 19, 1958, the predecessor of petitioner Banco Para el Comercio Exterior de Cuba (hereinafter called "Banco") purchased eight ships in Canada, one of which was the M.V. Canadian Challenger, subsequently renamed M.V. Ciudad de la Habana (hereinafter sometimes called the "Habana"). The ships had then been idle for more than a year as a result of a protracted strike of Canadian seamen. On the same day Banco's predecessor entered into a lease-purchase agreement covering the ships with respondent Flota Maritima Browning de Cuba, S.A., a Cuban corporation (hereinafter called "Browning"). A similar lease-purchase agreement relating to six other ships had been executed at an earlier date.

The agreement required Browning to outfit and operate the ships and pay a monthly rental. Browning was given the option to purchase the ships, in which case the rental payments would be credited toward the purchase price and a marine mortgage would be given for the balance. The lessor, Banco's predecessor, was given the power at any time to cancel the agreement and convey title to Browning subject to a mortgage equal to the unpaid purchase price after giving credit for rental payments. The purchase price was almost identical to the discounted value of the total monthly payments over the seven years the agreement was to run. The agreement contained a provision that no obligations could be incurred which could give rise to a lien with notice of the restriction to be posted on the ship.

The Habana was towed to Baltimore where outfitting was commenced.

In October 1958 a dispute arose over performance of the two contracts, and Browning declared them cancelled and delivered all the ships back to Banco's predecessor. The outfitting of the Habana was continued by Banco's predecessor and then Banco. On June 9, 1959 all the Canadian vessels (including the Habana) were conveyed by Banco to the Republic of Cuba.

On June 22, 1959 the original libel in this suit was filed. The Habana was arrested by the marshal and remains in his custody. Since October 1962 it has been at dead anchorage in Baltimore Harbor, unattended. Except for emergency measures to keep the vessel afloat, it has received no maintenance whatsoever since that time.

The original libel was *in rem* against the Habana and *in personam* against Banco with a clause of foreign attachment. Although large damages are claimed *in personam* against Banco, only $30,000 is sought on the claimed maritime lien against the ship. A motion asserting a lack of admiralty jurisdiction was denied by the district court, 181 F. Supp. 301, Appendix C *infra*.

An amended libel was filed, and two intervening libels were filed by suppliers of services rendered to the vessel while still in Browning's possession, one by Hinkins Steamship Agency, Browning's agent, and one by Nicholas G. Ford for watchman's services. A third intervening libel was filed by Maryland Shipbuilding & Drydock Company for services rendered after the arrest.

Banco answered the libel and filed a cross-libel seeking damages against Browning for breach of contracts. The Republic of Cuba filed a claim as owner and an answer to the libel.

In May 1962 the Czechoslovak Ambassador, representing the diplomatic interests of Cuba in the United States, filed a motion and plea of sovereign immunity. The motion was denied by the district court, 218 F. Supp. 938 (Md. 1963), and affirmed by a divided court of appeals, 335 F. 2d 619 (4th Cir. 1964), on the ground that having appeared and answered and delayed 3 years in asserting the issue, the Republic of Cuba had waived its immunity, both from jurisdiction and execution. The Ambassador was denied leave to file a petition in this Court for a writ of prohibition and/or mandamus seeking the release of the ship, *Duda* v. *District Court*, 380 U. S. 970 (1965).

Browning then moved for an order directing the sale of the ship pursuant to Rule 12; Banco moved for security on its cross-libel; the Republic of Cuba moved to require the marshal to restore the vessel, which had deteriorated badly, or to obtain a bond for the cost of restoration. The Czechoslovak Charge d'Affaires again raised the issue of sovereign immunity, asserting that the proposed sale of the Habana would constitute an interference with Cuba's right to the vessel tantamount to execution as the term is traditionally used in the law of sovereign immunity.

The district court granted the motion for sale and denied the motions of petitioners, and the court of appeals affirmed, one judge dissenting.

At the same time this suit was commenced, Browning commenced a similar suit in the Canadian admiralty courts. That suit which was carried to the Supreme Court of Canada was dismissed on a plea of sovereign immunity, *Flota Maritima Browning de Cuba S.A.* v. *Republic of Cuba*, [1962] S.C.R. 598.

Reasons for Granting Writ

This case presents for review important questions relating to admiralty jurisdiction and procedure, and sovereign immunity.

1. The court below held that the suit, based upon alleged breach of a lease-purchase contract, is within the admiralty jurisdiction.[1] The decision conflicts with that of the Second Circuit in the landmark case of *The Ada*, 250 Fed. 194 (2d Cir. 1918), and results in an expansion of admiralty jurisdiction into a new area, which this Court

[1] The question of the court's jurisdiction may be raised at any stage by a party or by the court, *Bors* v. *Preston*, 111 U. S. 252 (1884); *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U. S. 149 (1908); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939).

on several occasions has stated to be impermissible, *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, 260 U. S. 490, 1923 A.M.C. 55 (1923); *Plamals* v. *The Pinar del Rio*, 277 U. S. 151, 1928 A.M.C. 932 (1928); *W. A. Marshall & Co.* v. *The President Arthur*, 279 U. S. 564, 1929 A.M.C. 831 (1929). Yet a contract for the sale of a vessel is not maritime, *The Ada, supra; Grand Banks Fishing Co.* v. *Styron*, 114 F. Supp. 1, 1953 A.M.C. 2172 (Me. 1953); nor will admiralty compel specific performance of a contract of sale, *Rea* v. *The Eclipse*, 135 U. S. 599 (1890). In *The Ada, supra*, the Second Circuit held that admiralty had no jurisdiction in a suit over a lease-purchase contract. The district court below expressly rejected the holding of *The Ada*, and the court of appeals attempted to distinguish the case on the ground that the seven-year term of the contract here in issue was longer than the six-month contract in *The Ada*. That the term of a contract should determine whether it is maritime is a dubious rule. More important the court gave no weight to the fact that in the subject contract the lessor, as well as the lessee, could convert the lease to a sale, whereas in *The Ada* only the lessee had the power. Thus the contract here has more of the attributes of a sales contract than in the Second Circuit case.[2]

Both courts below held, in addition, that the leasing provisions of the contract, which standing alone would be maritime, are separable from the sales provisions which are non-maritime. Where a single contract contains both maritime and non-maritime provisions which are susceptible of separate determination, admiralty has jurisdiction of claims asserted under the maritime provision, *Compagnie Francaise de Navegation* v. *Bonnasse*, 19 F. 2d 777

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[2] The district court, 181 F. Supp. at 309-310, sought to distinguish *The Ada* on the further ground that the contract here gave Browning an unconditional right to terminate at any time. This was apparently based upon a misreading of the agreement, for it does not contain such a provision. The Court of Appeals did not find the point substantial.

(2d Cir. 1927), *cert. denied sub. nom. American Exchange Irving Trust Co.* v. *Bonnasse*, 275 U. S. 551 (1927); *Pillsbury Flour Mills Co.* v. *Interlake S.S. Co.*, 40 F. 2d 439 (2d Cir. 1930), *cert. denied*, 282 U. S. 845 (1930). In the latter case the contract called for shipping grain (maritime) and then winter storage (non-maritime).

Here there is no way of separating the non-maritime provisions in the contract. All the obligations of the parties are equally applicable to the sale and to the lease provisions. The obligations of Browning to outfit, insure, operate and maintain the ships are not only those of a lessee, but are similarly those a vendor would normally require of a vendee who has given back a mortgage.

Even if the claims asserted by Browning might in another context be deemed maritime, it is the contract, not the claims, which determines jurisdiction, and the contract is not divisible. In *The Ada* the libel expressly sought relief under the charter provisions of the contract, as well as the sale provisions, but the Second Circuit reversed the district court which had held the contract separable.

A second jurisdictional fault is present which was raised in the court of appeals, but not discussed in its opinion. The Habana had been out of service for almost two years when the libel was filed in June 1959. It had been idled by a strike since July 1957, and was never thereafter restored to service. Such a vessel is a dead ship, over which admiralty has no jurisdiction, *The Murphy Tugs*, 28 Fed. 429 (E.D. Mich. 1886); *The C. Vanderbilt*, 86 Fed. 785 (E.D.N.Y. 1898), *aff'd sub. nom. The America*, 93 Fed. 986 (2d Cir. 1899); *The Andrew J. Smith*, 263 Fed. 1004 (E.D.N.Y. 1920); *Murray* v. *Schwartz*, 175 F. 2d 72, 1949 A.M.C. 1081 (2d Cir. 1949); *The Meteor*, 1950 A.M.C. 1046 (E.D.N.Y. 1950); *Rijnders* v. *Yacht Green Lion*, 1955 A.M.C. 83 (S.D.N.Y. 1954)

There are sound reasons for strictly limiting admiralty jurisdiction. In admiralty a libelant enjoys advantages which would be shocking in an action at law. Without submitting even an affidavit on the merits of his claim, and without securing the owner except by a nominal bond for costs, the libelant can cause the arrest of a valuable ship. Admiralty procedures are grossly inequitable in the handling of non-maritime claims against a ship, and the law on priority of claims is hopelessly confused. See Gilmore and Black, The Law of Admiralty, 592, ff. The recent extension of the Federal Rules of Civil Procedure to admiralty matters indicates a salutory trend bringing admiralty into the mainstream of our judicial system. To expand admiralty jurisdiction now would be a step backward.

2. The district court's ordering the sale of the Habana raises a number of questions under the recently promulgated Rule E(9)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims. The rule provides that:

> "If property . . . arrested is . . . liable to deterioration . . . , or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court . . . may order the property . . . to be sold."

The old Rule 12 provided that if "the claimant shall unreasonably neglect [to secure the release of a vessel] the court may . . . on due cause shown, order a sale of such ship," while Rule 11 dealt with the sale of perishable goods other than vessels.

Under Rule 12, although the district court could consider a sale only where the owner had "unreasonably neglect[ed]" to bond the ship, the factors of deterioration and expense of keeping were in practice important factors in determining whether a sale should be ordered. The issue

in the court below was argued only in terms of whether the failure to bond the vessel was unreasonable neglect.

The basic question is whether an arrested vessel may be sold over the objection of its owner, when there are compelling reasons not to sell, and the libelant is not prejudiced by the retention of the vessel by the marshal.

There is grave doubt that a marshal's sale could pass valid title to the Habana. If the district court does not have jurisdiction of the suit, the sale would be void, *Williamson* v. *Berry*, 49 U. S. (8 How.) 495 (1850); *Lessee of Hickey* v. *Stewart*, 44 U. S. (3 How.) 75 (1845). As the Habana is the property of the Cuban Government, it is subject to the Cuban Assets Control Regulations, 31 C. F. R. Part 515, which prohibit any unlicensed sale of such property and declare an unlicensed transaction to be void, 31 C. F. R. §§ 515.201, 515.203. It appears that no license has been sought, and there is no assurance that a license would be granted, as the matter is one of unlimited administrative discretion. Under these circumstances, it is most improbable that any prospective purchaser would even bid for the ship.

In addition, the Republic of Cuba asserts that the vessel is immune from execution. Although the claim has been denied in the courts below, this Court has not yet ruled on the merits of the issue, and the brief of the United States submitted in *Duda* v. *District Court*, motion denied, 380 U. S. 970, indicated that the issue remains open with the possibility that a suggestion of immunity might be filed at some future time. Such a suggestion would be binding on the Court, *Ex part Peru*, 318 U. S. 578 (1943). Assuming that the proceeds of an interlocutory sale would be immune[3], the result would still be the frustration of the principle of

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[3]One state court has held the proceeds of the judicial sale of immune property not to be immune, *United States* v. *Harris & Co.*, 149 S. 2d 384 (Fla. App. 1963).

immunity. For the sales price at a sacrifice sale would bear no relationship to the real value of the ship.

The only relief Browning seeks against the Habana is $30,000. As Judge Bryan, dissenting below, noted, this is far less than even the scrap value of the ship. Thus, there is no reason to sell the Habana at this time, particularly in view of the fact that seven years have elapsed since the arrest, and it seems likely that its deterioration, the principal concern, has now stabilized.

To permit an interlocutory sale because of the failure of the claimant to secure its release on bond (the crucial condition under former Rule 12 and a substantial one under the new Supplemental Rule E(9)(b)) would work great injustice. Without submitting a bit of evidence, a libelant can cause the arrest of a valuable ship. Under the interpretation of the courts below, he can force the owner to bond it under the threat that it will otherwise be sold. All this may be done without regard to the merits of the dispute, and with no recourse by the owner except on a bond for costs so small as to be negligible. Such a procedure makes admiralty a vehicle for extortion. There may be classes of suitors in admiralty entitled to special protection, e.g., seamen as in *Solomon* v. *Bruchhausen,* 305 F. 2d 941 (2d Cir. 1962), but certainly the ordinary commercial claimant should not be given such arbitrary power.

3. Banco filed a cross-libel against Browning, and when Browning moved for an interlocutory sale of the Habana, Banco moved for security on the cross-libel pursuant to Admiralty Rule 50. The district court denied the motion and the Court of Appeals affirmed. The substance of Rule 50 is now found in Supplemental Rule E(7) which provides:

> Whenever there is asserted a counterclaim arising out of the same transaction * * * and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose

> benefit such security has been given shall give security * * * to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct * * *

The direction of the Rule is mandatory. Security on the counterclaim *shall* be given unless good cause shall be shown. The few cases interpreting the Rule are not helpful in determining what is good cause in this context. The leading case interpreting former admiralty Rule 50 *Washington Southern Co.* v. *Baltimore Co.*, 263 U. S. 629 (1924) does not discuss the issue except as it states the purpose of the Rule to be "to place the parties on an equality as regards security", 263 U. S. at 638-639. Most of the cases involve insolvent libelants, and have reached quite inconsistent results. *The City of Beaumont*, 8 F. 2d 599 (4th Cir. 1925), held that an insolvent libelant would not be required to post security on a cross-libel. *Seaboard & Carribean Transport Corporation* v. *Hafen-Dampfschiffahrt, A.G.*, 329 F. 2d 538 (5th Cir. 1964) held that, while the court would not impose a security requirement on the insolvent libelant, the original respondent's security should be released and the suit permitted to proceed *in personam*. A different solution was reached in *Geotas Compania de Vapores S. A.* v. *S. S. Arie H.*, 237 F. Supp. 908 (E. D. Pa. 1964) where the insolvent libelant was required to post security equal to that given by the respondent.

Here there is nothing in the record to indicate that Browning is insolvent. The "good cause" found by the courts below consisted of the delay in seeking relief, the continuing claim of immunity and the presence of intervening libels.

The relevance of delay is difficult to comprehend. Surely Browning has not been prejudiced. The vessel, whatever its deterioration, fully secures Browning to the full extent of its *in rem* claim. And it was certainly not unreasonable to forbear seeking security on the cross libel so long as

there was an expectation that the Habana would be released as immune.

That immunity continues to be claimed for the ship is not logically a factor for consideration after its denial by the Court of Appeals and the denial by this Court of an application raising the issue. The district court was obliged to maintain a degree of consistency within a single opinion. If the court deemed the Habana immune, it should have been released. If not immune, it should be so treated. It is unjust to hold the ship not immune on the owner's application for its release, but immune for the purpose of denying collateral relief against the libelant.

The intervening libels have no bearing whatsoever on the security issue at this stage. There is nothing in the record to suggest that Browning would be unable to post security, and thus no indication that the intervening libelants might be prejudiced. If Browning should fail to post security after being ordered to do so, then on an application to the district court to release the ship it might be proper to consider what interest the intervening libelants might have.[4]

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[4] Even if the interests of the intervening libelants were a concern, their libels are patently without merit. All three claim liens for services to the Habana while in Baltimore, when it was a dead ship. The libel of Hinkins Steamship Company was filed by Browning's agent, which must be charged with notice of the provision in the lease-purchase agreement, Art. Second, Section 14, that no liens might be levied on the ship, and, if any should be, it was Browning's obligation to remove them. The libel of Nicholas Ford, for watchmen's services, is also subject to the no-lien provision, and to the further infirmity that watchmen's services do not give rise to maritime liens, *The F. S. Loop*, 63 F. Supp. 105 (S. D. Cal. 1945); *The Sinola*, 209 Fed. 287 (Cal. 1913); *The Fortuna*, 206 Fed. 573 (Wash. 1913). The libel of Maryland Shipbuilding & Drydock Company is for services rendered after the arrest, while the Habana was *in custodia legis*, from which no lien can result, *Collie* v. *Ferguson*, 281 U. S. 52 (1930); *Vlavianos* v. *The Cypress*, 171 F. 2d 435 (4th Cir. 1948); *Putnam* v. *Lower*, 236 F. 2d 561, 570 (9th Cir. 1956).

4. The courts below held that sovereign immunity had been waived, as to both jurisdiction and execution.

The accepted doctrine of sovereign immunity holds that a waiver of immunity from jurisdiction does not constitute a waiver of immunity from execution, *Dexter & Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen,* 43 F. 2d 705 (2d Cir. 1930), *cert. denied,* 282 U. S. 896 (1931). The court below held that in an action *in rem* against a ship, a waiver of immunity, by reason of appearance by the sovereign owner claiming the vessel and answering the libel, and delay in asserting immunity, constituted also a waiver of immunity from execution of the vessel seized. This is a novel view, finding no support in any authority.[5]

What authority exists is to the contrary. In *Weilamann* v. *Chase Manhattan Bank,* 21 Misc. 2d 1086, 192 N. Y. S. 2d 469 (Sup. Ct. 1959), it was held that where jurisdiction had been obtained by attachment, the attached property could not be reduced to the sheriff's possession as that would constitute execution, as the term is used in this context. The views of the Department of State, which have been given substantial weight in this area, and are held conclusive when the Department suggests immunity, *Ex parte Peru,* 318 U. S. 578 (1943), support petitioners' position. In *New York & Cuba Mail SS Co.* v. *Republic of Korea,* 132 F. Supp. 684 (S. D. N. Y. 1955), the court deemed itself bound by the Department's suggestion that although there was in that case no immunity from jurisdiction, attachment of the sovereign's funds to acquire jurisdiction was not permissible. In the *Weilamann* case the State Department had stated that "even when the attachment of the property of a foreign sovereign is not

[5] The May 3, 1962 proposed official draft of the Restatement of the Foreign Relations Law of the United States (Second) § 74 set forth such a rule, and this was relied upon by the district court, 218 F. Supp. at 943-944, but the final version of the Restatement omits the provision.

prohibited for the purpose of jurisdiction, nevertheless the property so attached and levied upon cannot be retained to satisfy the judgment * * *" (the text is found in the Restatement (Second) at 215-216). The same view was expressed in the State Department's communication in *Stephen* v. *Zivnostenska Banka,* 15 A. D. 2d 111, 116, 222 N. Y. S. 2d 128, 134 (1st Dept. 1961). In *Duda* v. *District Court,* motion denied, 380 U. S. 970, the brief of the Solicitor General submitting the views of the United States observed that there was no authority for the holding of the court of appeals and that it was "doubtful" that there could be execution against attached property of a sovereign to satisfy a judgment, *Duda* v. *District Court, supra,* brief of the United States, p. 10, n. 8.

The question of the extent of the waiver is even more critical with respect to the interlocutory sale of a ship than with regard to execution to satisfy a judgment. Execution after judgment at least occurs after an adjudication of the merits of the underlying dispute. An interlocutory sale, however, irrevocably deprives the sovereign of its property even though it may ultimately prevail on the merits. And if the vessel is sold at a sacrifice sale, a future determination of immunity from execution would be all but meaningless.

The foregoing assumes a waiver of immunity from jurisdiction. We contend, however, that a general appearance by the sovereign does not constitute even a waiver of jurisdiction. Although several lower court cases have held such conduct to be a waiver, *The Sao Vicente,* 281 Fed. 111 (2d Cir. 1922); *The Sao Vicente,* 295 Fed. 829 (3d Cir. 1924); *The Uxmal,* 40 F. Supp. 258 (Mass. 1941), this Court has never decided the issue except in cases involving a domestic sovereign, *Porto Rico* v. *Ramos,* 232 U. S. 627 (1914); *Richardson* v. *Fajardo Sugar Company,* 241 U. S. 44 (1916). A domestic sovereign's immunity rests on completely different bases than that of a

foreign sovereign, the latter being determined by international law. Moreover, a claimant's appearance in an in rem suit is not voluntary, as Judge Bryan, dissenting, noted in the court of appeals when the issue was before it, 335 F. 2d 619, 628.

A theory of irrevocable waiver of immunity is inconsistent with the rule that a sovereign may always revoke its consent to be sued. *Principality of Monaco* v. *Mississippi,* 292 U. S. 313 (1934); *Lynch* v. *United States,* 292 U. S. 571 (1934).

In England an unconditional appearance does not effect a waiver, as there can be no submission to jurisdiction without the full authority of the sovereign, *Baccus S. R. L.* v. *Servicio Nacional del Trigo,* [1957] 1 Q. B. 438, [1956] 3 All E. R. 715.

Apart from the question of waiver, all of the elements of sovereign immunity were necessarily found in the Canadian action brought by Browning, [1962] S. C. R. 598, and collateral estoppel prohibits the questioning of any matter necessarily determined there: the purchase of the Canadian ships by Banco's predecessor and the conveyance to the Cuban state, see *Ritchie* v. *McMullen,* 159 U. S. 235 (1895). As the Habana was never used in commerce by Banco or the Republic of Cuba, the "restrictive doctrine" of immunity is irrelevant, if indeed it would otherwise be a consideration, *cf. Berizzi Bros. Co.* v. *The Pesaro,* 271 U. S. 562 (1926).

6. The Habana has been in the custody of the marshal since June 1959. Since October 1962 it has lain at dead anchorage, unattended. Except for emergency measures when it was feared that the ship would sink, it has received no maintenance whatsoever, despite the provisions of 28 U. S. C. § 1921 permitting the marshal to obtain a deposit from the libelant to cover the cost of maintaining property in his custody. The role of 28 U. S. C.

§ 1921 was expressly referred to in the new supplemental Rule E(4)(e).

The liability of the marshal under such circumstances is clear, *The Robert R. Kirkland,* 153 Fed. 863 (3d Cir. 1907); *Palmer* v. *Costello,* 41 App. D. C. 165 (1913); 2 Benedict, *Admiralty* (6th Ed.) 386. Yet the marshal's bond is only $20,000 (28 U. S. C. § 544), painfully inadequate to begin to cover the loss resulting from the deterioration of the ship. The marshal should either restore the ship, or procure a bond for that purpose. At a bare minimum he should be held responsible for the loss resulting from vandalism and pilferage to the ship's equipment, for that is the direct consequence of permitting the vessel to lie unattended.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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July 14, 1966

APPENDIX A

Opinions of the Court of Appeals

Before:

HAYNSWORTH, *Chief Judge,* and BOREMAN and BRYAN, *Circuit Judges.*

HAYNSWORTH, *Chief Judge:*

Banco Para El Comercio Exterior de Cuba and the Republic of Cuba seek, in addition to other incidental relief, to set aside an order of the United States District Court for the District of Maryland directing the sale, pursuant to Admiralty Rule 12, of the motor vessel Ciudad de la Habana. The source of the controversy and the details of related litigation appear more fully in other opinions.[1]

Banco is a Cuban corporation, organized by the Republic of Cuba for the advancement of its foreign trade. Banco's predecessor negotiated with an American citizen, Browning, for an agreement to operate certain vessels then owned by it. To this end Browning, together with other American citizens, formed a Cuban corporation, Flota Maritima Browning de Cuba, Sociedad Anonima, with which Banco entered into two agreements[2] to lease the vessels. Flota Maritima was given an option to purchase the vessels, with previously paid rentals to be applied to the purchase price.

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[1] *Flota Maritima Browning* v. *Motor Vessel Ciudad de la Habana,* 4 Cir., 335 F. 2d 619, affirming, 218 F. Supp. 938; *Flota Maritima Browning* v. *La Ciudad de la Habana, D. Md.,* 181 F. Supp. 301.

[2] One agreement, the "English Lease Purchase Contract," covers six vessels for a term of fifteen years. The other, the "Canadian Lease Purchase Contract," relates to eight vessels purchased by Banco from Canadian National (West Indies) Steamship, Ltd. and three other vessels owned by Banco. It extended for a term of seven years and included the Ciudad de la Habana, formerly the Canadian Challenger. The libel pursuant to which the Habana was seized contains a cause of action based upon an alleged breach of each contract.

Banco retained the right to convert the leases into a contract of sale with a marine mortgage in an amount equal to the unpaid purchase price, computed as if Flota Maritima had exercised its option. Each agreement required Flota Maritima to pay a specified monthly rental which, over the term of the agreement, would equal or exceed the purchase price.

In October, 1958, after the motor vessel, Ciudad de la Habana, had been brought to Baltimore for outfitting, pursuant to one of the agreements, a dispute arose between the parties over the performance of the contracts, and Flota Maritima delivered the vessels back to Banco which then continued the outfitting of the Habana in Baltimore. On June 9, 1959, allegedly, the vessels were transferred by Banco to the Republic of Cuba. The original libel, filed June 22, 1959, was in rem against the Habana and in personam with a clause of foreign attachment against Banco. An amended libel was filed October 9, 1959. Since June, 1959 the Habana has been in the custody of a United States Marshal in dead anchorage in Baltimore harbor. Unmaintained and unmanned, its condition has deteriorated steadily.

In its libel, Flota Maritima sought to recover as damages sums expended in outfitting the vessels and loss of the profits anticipated in the performance of the lease. Banco has filed a cross libel against Flota Maritima, also for breach of the lease-purchase agreement. Cuba has filed a claim as owner of the vessel.

After our earlier disposition of the claim of sovereign immunity,[3] Flota Maritima moved for an order, pursuant to Admiralty Rule 12, directing sale of the Habana. Banco moved for cross-security on its cross libel under Admiralty Rule 50, and Cuba moved for an order compelling the Mar-

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[3] *Flota Maritim Browning* v. *Motor Vessel Ciudad de la Habana*, 4 Cir., 335 F. 2d 619, affirming, 218 F. Supp. 938.

shal to restore the Habana or to procure a bond securing the cost of restoration. Banco and Cuba appeal the adverse determination of these motions.

Appellants interpose again [4] on this appeal the argument that ship lease-purchase agreements are not within the jurisdiction of an admiralty court. Although subjected to recent criticism,[5] the prevailing rule has been that a contract for the sale of a ship is not a maritime contract.[6] The charter of a vessel, however, is maritime.[7] Banco Banco advances the principle that if a contract is not wholly maritime there is no admiralty jurisdiction. While the principle is one of general validity when the non-maritime elements of the contract are substantial and inseparable

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[4] This argument was rejected in *Flota Maritima Browning* v. *La Ciudad de la Habana*, D. Md., 181 F. Supp. 301, and no appeal was taken. It was not advanced when the case was here before. Unquestionably, however, lack of jurisdiction over the subject matter may be raised at any time.

[5] *Flota Maritima Browning, supra*, note 4; *Gilmore & Black, Admiralty*, 24-25; Note, the Law of Admiralty and Ship Sale Contracts, 6 Stan. L. Rev. 540.

[6] *The Ada*, 2 Cir., 250 Fed. 194; *Grand Banks Fishery Co.* v. *Styron* (the Caracara), D. Me., 114 F. Supp. 1; *Hirsch* v. *The San Pablo, D. Fla.*, 81 F. Supp. 292. Similarly, an admiralty court does not have jurisdiction to compel specific performance of a contract to purchase a vessel. *Rea* v. *The Eclipse*, 135 U. S. 599; *The Guayaquil*, S. D. N. Y., 29 F. Supp. 578.

[7] See *J. B. Effenson Co.* v. *Three Bays Corp.*, 5 Cir., 238 F. 2d 611; *Cory Bros. & Co.* v. *United States*, 2 Cir., 51 F. 2d 1010; *Gronvold* v. *Suryan*, W. D. Wash., 12 F. Supp. 429.

from the maritime elements,[8] it has long been recognized that where the maritime elements of a contract are susceptible to separate adjudication admiralty jurisdiction may be exercised to that extent. *Compagnie Francaise de Navigation a Vapeur* v. *Bonnasse,* 2 Cir., 19 F. 2d 777, 779; *Eastern Mass. Street Ry.* v. *Transmarine Corp.,* 1 Cir., 42 F. 2d 58; *Berwind-White Coal Mining Co.* v. *City of New York,* 2 Cir., 135 F. 2d 443.

We agree with the District Judge, largely for the reasons expressed by him in a thoughtful opinion,[9] that the maritime aspects of this lease-purchase agreement are separable and that the specific claims may be adjudicated in an admiralty court.

In the Ada, 2 Cir., 250 Fed. 194, the court held that claims arising out of the breach of a charter agreement containing an option to purchase were not cognizable in admiralty. From the three separate opinions filed by the court, however, it is apparent that each judge con-

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8. *The Ada,* 2 Cir., 250 Fed. 194; *Compagnie Francaise de Navigation a Vapeur* v. *Bonnasse,* 2 Cir., 19 F. 2d 777; *D. C. Andrews & Co.* v. *United States,* Ct. Cl., 124 F. Supp. 362. *But see. Sword Line, Inc.* v. *United States,* 2 Cir., 228 F. 2d 344, aff'd, 351 U. S. 976 (jurisdiction in admiralty over charterer's suit in quasi contract to recover excess charges); *Luckenbach S. S. Co.* v. *Coast Mfg. & Sup. Co.,* S. D. N. Y., 185 F. Supp., 910, 916 (incidental to admiralty elements and non-separable); *Gronvold* v. *Suryan, supra,* note 7 (incidental elements and non-separable). Where the non-maritime elements of a contract are considered separable from those maritime, an admiralty court is ousted of jurisdiction over the former. *Pillsbury Flour Mills Co.* v. *Interlake S. S. Co.,* 2 Cir., 40 F. 2d 439, cert. denied, 282 U. S. 845; *Armstrong Cork Co.* v. *Farrell,* E. D. Pa., 81 F. Supp. 848; *The Ciano,* E. D. Pa., 63 F. Supp. 892.

9 *Flota Maritima Browning* v. *La Ciudad de la Habana,* 181 F. Supp. 301.

sidered the agreement primarily one for the sale of the vessel. The lease agreement there was limited to a period of six months. During that period the charterer had the use of the vessel upon payment of a fixed sum in specified installments. It also had an option to purchase the vessel at any time for the same sum, the owner agreeing to deposit a bill of sale in escrow as soon as possible. At the time of the breach of the contract, the charterer had in fact exercised his option to purchase, thereby converting the agreement into a contract of sale.

Under other lease-purchase agreements, however, claims may arise which are clearly founded upon the lease provisions and which would be within admiralty jurisdiction. The primary opinion in the Ada clearly recognized this possibility.

In this case the agreements were to extend for periods of seven and fifteen years. The economic compulsion to exercise the purchase option is clearly not so great where the cost of use for a long period approximates purchase price as it is where the cost of use for six months is the same as the purchase price. Nor is there an indication that the rentals here were so unreasonably high as to suggest a disguised sale. Although the contract could have been converted into a sale at the option of either party, up to the time of its termination it had not been. Unlike the contract in the Ada, at the time the libel was filed, the parties had operated only under the lease provisions and the purchase-sale options were unexercised. The character of the contract was thus fixed, as between the parties, as a charter.

The District Court's opinion rested in part upon an interpretation of the Canadian agreement which gave the lessee a right to terminate at any time without penalty. That interpretation is challenged here, but the absence of such a provision does not mean that the lease provisions

must be disregarded and the agreement treated as a contract of sale.

The damages sought are for loss of the profits of operating the vessels and for certain sums expended in outfitting the ship. The maritime character of contracts to operate [10] or repair [11] a vessel is clear. It would be an unduly strict limitation of traditional admiralty jurisdiction to hold that power to deal with these maritime claims was lost merely because they were based upon an agreement which contained dormant, non-maritime as well as maritime provisions.[12] Where such non-maritime provisions are contingent and have never been given effect, it is not difficult to separate them from the contract and permit separate adjudication in admiralty of the maritime claims arising out of the contract.

Objection to the order of sale on the basis of asserted lack of admiralty jurisdiction, with which we have dealt, is supplemented by a reiteration of the claim of sovereign immunity. That claim was first advanced on behalf of the Republic of Cuba long after it had entered a general appearance. It was denied by the District Court.[13] We affirmed on the ground that the claim in both its jurisdictional and execution aspects had been effectively waived.[14] The Supreme Court denied leave to file a petition for a writ of prohibition or mandamus.[15]

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[10] See note 7, supra.

[11] *New Bedford Drydock Co.* v. *Purdy*, 258 U. S. 96; *The Scorpio*, 5 Cir., 181 F. 2d 356.

[12] See *Eastern Mass. Street Ry.* v. *Transmarine Corp.*, 1 Cir., 42 F. 2d 58.

[13] 218 F. Supp. 938.

[14] 335 F. 2d 619.

[15] 380 U. S. 970.

The Czechoslovakian Ambassador, on behalf of the Republic of Cuba, now undertakes a fragmentation of the claim of execution immunity. We have held only, he says, that a claim of the vessel's immunity from arrest and continued detention may not be asserted; immunity from sale, he contends, is another question.

We think not. When Banco and Cuba entered their general appearance the claim of sovereign immunity from execution was waived; there were no explicit or implicit limitations. We held previously that because seizure was for the purpose of execution as well as jurisdiction, immunity in both aspects was waived when the general appearance was entered without reservation.

In its execution aspect, the arrest of the vessel, and its subsequent detention, were solely for the purpose of securing payment of the claim out of the proceeds of a sale or out of a bond if the owner obtains the vessel's release. For execution purposes, detention of the vessel, or the bond which stands in her stead, is meaningful only in terms of its ultimate conversion into money for the benefit of the libellant. The things are inseparable, and a general waiver of immunity from execution forecloses an assertion of immunity during any stage of the proceedings.

The immunity claim, as an objection to an order of sale, was fully adjudicated when the case was here before.

There are other objections to the order of sale and appeals from denial of Banco's motion for cross security and of Cuba's motion to require the United States Marshal to restore the vessel to her former condition. We affirm the District Court in all of those respects for

reasons which sufficiently appear in its opinion of August 16, 1965.[16]

The order of sale is affirmed, and this Court's order staying the sale during the pendency of these appeals is dissolved. A certified copy of the judgment in lieu of a mandate will issue forthwith.

Affirmed.

ALBERT V. BRYAN, *Circuit Judge*, disenting:

For the reasons stated in my initial dissent in this case, *Flota Maritima Browning De Cuba* v. *Motor Vessel Ciudad De La Habana*, 335 F. 2d 619, 631 (1964), I do not think there has been a waiver of execution. Further, I find the order of sale inequitably oppressive in the circumstances here.

The libelants (using the term *infra* to include both Flota and the intervenors) have procured a sale of the vessel without one tittle of evidence to prove their claims. Equally indefensible, the vessel now ordered sold is admittedly not owned by Banco, the only party charged by the libelants with creating the alleged liability. The vessel is owned by the Republic of Cuba. This is excused by the District Court with the explanation that Cuba owns Banco, yet in an earlier opinion in this case, 218 F. Supp. 938, 940 (1963), the District Court found that Banco was an "autonomous" entity in which Cuba was only the majority stockholder.

The sale is ordered under Supreme Court Admiralty Rule 12. The power of sale there given is conditioned upon the owner's "unreasonable neglect to make any . . .

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[16] *Flota Maritima Browning de Cuba, Sociedad Anonima*, v. *Motor Vessel Ciudad de la Habana*, D. C., Md., 245 F. Supp. 205. We do not grant the motions to dismiss the appeals because of the substantial effect a sale of the vessel may have upon the ultimate rights of the parties.

application" to have the ship delivered to him. Here the owner's "neglect", if it be such, was hardly "unreasonable." There were substantial defenses, including the pleas of sovereign immunity, albeit they were eventually overruled. Under the present facts the equities of Cuba and the libelants are at least equal. A sale will be an irretrievable step, *inflicting irreparable injury upon Cuba, even if she wins the case.* Certainly, Cuba's success is a possibility which should not be ignored in determining whether to sell. The right under Rule 12 to sell is discretionary, requiring a balancing of equities, and I think this discretion is abused by a pretrial sale.

Proctors for Banco and Cuba suggested to us that the ship—already detained for more than six years—would not deteriorate beyond restoration, as a live ship, before expeditious hearings of the libel and intervening petitions could be concluded. Indeed, they suggested that the scrap value of the Ciudad De La Habana would exceed the libelants' claims against her. If either of these assertions is sustainable, then the libelants surely are not entitled to the sale, for the retention of the ship would not prejudice them. The libelants should shoulder the burden to prove that the value of the ship is now, or will be upon the final disposition of the suit, insufficient to respond to the genuine claims of the libelants.

The most advisable solution of the problem is an immediate trial of the cause. To repeat, I think no sale at all is permissible, and certainly not one without a trial of the case on the merits.

APPENDIX B

Opinion of the District Court

THOMSEN, *Chief Judge*

This case is now before the Court on (A) a motion under Admiralty Rule 12 to sell the M. V. Ciudad de la Habana, filed by libelant, supported by intervening libelants and by the Marshal, and opposed by respondent Banco and claimant Republic of Cuba, (B-1) a motion by Banco, as respondent and cross-libelant, to require security from Flota, as libelant and cross-respondent, and (B-2) a motion by claimant to require the Marshal to restore the vessel to her condition at the time of arrest, or to post or obtain from libelant a bond to secure such restoration, or in default thereof to release the vessel to claimant.

The background facts are set out in the previous opinions in this matter, 181 F. Supp. 301 (1960), 218 F. Supp. 938 (1963), aff'd 4 Cir., 335 F. 2d 619 (1964). They will be only briefly summarized in this opinion.

FACTS

The libel in this cause was filed on or about June 22, 1959. Pursuant thereto the vessel was arrested by the Marshal and remains in his possession. Exceptions to the libel for lack of jurisdiction over the subject matter were filed by the vessel and Banco on August 20, 1959. The exceptions were sustained with leave to amend, and an amended libel was filed on October 9, 1959. Exceptions to the amended libel, exceptive allegations and a motion to decline jurisdiction were filed by the vessel and Banco on November 23, 1959, and were denied in an order filed February 19, 1960. See 181 F. Supp. 301.

A claim by the Republic of Cuba, as owner of the vessel, was filed on October 27, 1960, and the next day it filed an answer to the libel, in which it made no claim of sov-

ereign immunity. No security to release the vessel was posted and no other action of any sort was taken by claimant Republic until May 11, 1962.

Meanwhile, respondent Banco filed a cross-libel and complaint against Flota on April 27, 1961, seeking damages totalling $457,500. Flota filed its answer to the cross-libel on August 11, 1961.

On May 11, 1962, the Republic of Cuba, through the Czechoslovak Ambassador, filed a plea and motion for sovereign immunity. The plea and motion were denied by order of this Court dated August 6, 1963. 218 F. Supp. 938. That order was affirmed by the Fourth Circuit on July 14, 1964. 335 F. 2d 619. A motion by the Czechoslovak Ambassador, acting for the Republic of Cuba, for leave to file a petition for a writ of prohibition and/or a writ of mandamus directed to this Court was denied by the Supreme Court of the United States on April 25, 1965. *Duda, Ambassador of Czechoslovak Socialist Republic* v. *United States District Court for the District of Maryland*, 380 U. S. 970.

The vessel is now and has since October 1962 been lying in the dead ship anchorage in Baltimore Harbor. Before that she was in the Maryland Shipbuilding and Drydock Co. yard, where she was arrested. She is subject to deterioration and decay, vandalism and pilferage, and has been and is deteriorating. Neither the Republic of Cuba nor anyone on its behalf has ever sought an appraisal of the vessel or deposited any money or stipulation to secure her release or to insure her safety during the pendency of these proceedings.

This Court, on November 4, 1963, authorized its Marshal to borrow not over $1,000 for the purpose of making necessary repairs to the vessel, and again on December 3, 1964, authorized the Marshal to arrange for the performance of other work necessary to preserve the vessel at a cost not to exceed $600.

Intervening libels against the vessel have been filed by several United States corporations and a partnership which furnished repairs, supplies and services to the vessel.

Libelant and intervening libelants have been prevented from prosecuting their claims against the vessel by the various motions filed by respondent Banco and by claimant Republic and by the difficulties which proctors for Banco and for claimant Republic have experienced in getting instructions from their clients. No unreasonable delays can properly be charged to libelant or to intervening libelants.

On June 9, 1965, libelant filed an application for sale of the vessel under Admiralty Rule 12. This application was supported at the hearing by intervening libelants and by the Marshal because of the condition of the vessel.

On June 29, 1965, cross-libelant Banco and claimant Republic filed a "motion," which was explained and amended at the hearing to constitute two motions: (1) on behalf of cross-libelant Banco, that the Court direct the cross-respondent (the libelant Flota) to give security, pursuant to Admiralty Rule 50, to respond in damages to the claims set forth in the cross-libel of Banco in such amount as the Court may direct and, if the cross-respondent fails to give such security, to direct the Marshal to release the vessel to the claimant; (2) on behalf of claimant, Republic of Cuba, that the Court direct the Marshal to restore the vessel to the condition in which she was on June 29, 1959, the date of her arrest, or in the alternative, to post a bond in the penal sum of $600,000, or to secure the posting of such bond by the libelant as security for such restoration, and in default thereof to direct the release of the vessel to claimant.

Two days later, on July 1, 1965, Dr. Jan Snobl, Charge d'Affaires ad Interim of the Czechoslovak Socialist Re-

public, purporting to appear specially on behalf of claimant, Republic of Cuba (despite the previous general appearance and answer to the libel filed by proctors for the Republic of Cuba as claimant in October 1960), filed a plea of sovereign immunity and a motion for sovereign immunity, to prevent the sale of the vessel. The plea and motion make substantially the same arguments which were made in the plea and motion asserting exemption of the vessel from seizure, which were filed by the Czechoslovak Ambassador on behalf of the Republic of Cuba in 1962. Those arguments were rejected by this Court and by the Fourth Circuit, 218 F. Supp. 938, 335 F. 2d 619. They were presented to the Supreme Court in support of the Ambassador's motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus, which was denied, 380 U. S. 970. The Secretary of State of the United States has never suggested to the Court that the M. V. Ciudad de la Habana was immune from seizure or would be immune from execution.

DISCUSSION

Since the question whether libelant, as cross-respondent, should be required to give security to respond in damages to the cross-libel may affect the question whether the vessel should be sold, the issue of cross-security will be discussed first.

Rule 50 provides:

> "Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless

the court for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs."

Libelant contends that since cross-libelant Banco (respondent in the original libel) has filed an answer to the libel but has not given any security to respond in damages to the libel, Banco is not entitled to demand security from libelant as cross-respondent. On the other hand, Banco contends that the seizure of the vessel amounts to the giving of security whether or not the vessel is thereafter released by the giving of security. The answer to Banco's contention depends upon the proper construction of Rule 50, as to which the few opinions dealing with the question are conflicting and unclear.

There is one Supreme Court case in point, *Washington Southern Co.* v. *Baltimore Co.*, 263 U. S. 629 (1924), decided shortly after Rule 50, amending and replacing former Rule 53, was adopted. The specific question certified to the Supreme Court by the Third Circuit in that case was whether Rule 50 "empowers the District Court to stay proceedings in the original suit until the original libelant shall have given security to respond to the counterclaim, in a case where the original libel was *in personam* and the original respondent (the cross-libelant) has given the security voluntarily; that is, of his own motion and without compulsion." 263 U. S. at 631. The Supreme Court answered the question "No," but in the course of the opinion Mr. Justice Brandeis, speaking for a unanimous Court, discussed the historical background and purpose of Rule 50 and some of the situations in which it might be applied, pp. 631-639, and concluded, pp. 639-640: "The new phrases introduced in Rule 50 were not designed to introduce any new practice concerning cross-libels. Their purpose was to formulate the practice which had become set-

tled. This is true of those relating to the giving of security, as it is of those concerning the character of the claims which may be asserted by means of a cross-libel."

In the course of the historical discussion showing the "practice which had become settled," Mr. Justice Brandeis said, pp. 638-639): "Neither was Rule 53 in terms limited to suits where the original libelant had made an arrest or attachment. But, although it remained in force, unmodified, for more than half a century, no reported case discloses that a stay was ordered under it, except where the original respondent had been obliged to give security in order to obtain release of the ship or of attached property. Here, as in England, the purpose of the provisions was declared to be to place the parties on an equality as regards security. And, under it, security to satisfy the counterclaim could not be exacted by means of a stay, unless the original libelant had compelled the giving of such security to satisfy his own claim."

Libelant in the instant case argues that the quoted language indicates clearly that the Court believed the settled practice to be that no stay or cross-security could be required "except where the original respondent had been obliged to give security in order to obtain release of the ship or of attached property." However, a footnote to that statement in the opinion of the Supreme Court cites, inter alia, *Empresa Maritima a Vapor* v. *North & South American Steam Navigation Co., S. D. N. Y.*, 16 Fed. 502 (1883), in which Judge Addison Brown had held that under old Rule 53 the respondents in a cross-libel should be required to give security where the vessel in the original libel is in custody, as well as where she has been released on bond or stipulation.

In *The Evangeline,* S. D. N. Y., 36 F. 2d 426 (1929), where the libelant attaching the ship was without assets, and it was claimed by the owner that the claims in the

libel were greatly inflated as a result of knowledge of the financial distress of the owner for the purpose of bringing about a sacrifice sale of the ship, and the owner was unable to furnish bond sufficient to lift the attachment, the Court held that the owner was entitled to security from the libelant under Admiralty Rule 50. The Court followed *The Empress, supra,* believing it to have been approved by the Supreme Court in *Washington-Southern, supra.* In *Central American S & T Corp.* v. *Mercantile Ship R. Co.,* E. D. N. Y., 73 F. Supp. 779 (1947), where a similar situation was presented, the Court held tersely that the cross-libelant's right to security "is clear beyond any doubt."

On the other hand, the Fifth Circuit reached the opposite conclusion in *Pan American Shipping Corp.* v. *Maritime Columbiana, Limitada,* 5 Cir., 193 F. 2d 845 (1952), relying on *Washington-Southern, supra, The Owego,* W. D. Wash., 289 Fed. 263 (1923), *The City of Beaumont,* 4 Cir., 8 F. 2d 599 (1925); and 2 Benedict on Admiralty, 1940 ed., by Knauth, sec. 331, which states: "The rule in its present form has no application unless the respondent or claimant in the original suit, i.e., the cross-libelant, has given security to respond in damages and has given it under compulsion to obtain the release of a vessel * * *."

In *The City of Beaumont, supra,* the Fourth Circuit held that Rule 50 does not require that a libel be dismissed because of libelant's unwillingness or inability to give bond to meet the demand asserted by claimant in a cross-libel, after having given security in the original libel, and that the Court has full discretion to determine whether it is practicable and just for libelant to give such security. Judge Waddill, speaking for the Court, discussed *Washington-Southern* and stated that the purpose of Rule 50 "was manifestly to place the parties, the libelant and cross-libelant, on an equality regarding security, as far as the same could be accomplished; but it never meant to

do more than could reasonably and lawfully be done to that end, within the discretion of the court, under carefully prepared rules prescribing the rights of the parties litigant and seeking to safeguard and preserve the same." 8 F. 2d at 601.

It is not necessary in this case to decide all of the questions raised by Rule 50. It is sufficient to say that in this Court's opinion the failure of a claimant to post security to release a vessel which has been seized under a libel in rem does not per se prevent such claimant, who is usually the respondent as well, from obtaining cross-security under Rule 50 from a libelant against which it has filed a cross-libel in a cause of action arising out of the same contract or cause of action. Whether such security should be required, however, and the amount of such security, if required, is always in the discretion of the Court, "for cause shown."

In the instant case a number of factors enter into the decision whether such security should be required. One is the long delay of respondent Banco, the cross-claimant, in demanding such security, during which period the vessel has deteriorated. It should be noted that in this case respondent and claimant are not the same, and libelant argues that since respondent does not own the vessel, none of its property is being held as security. In another case that fact alone might be controlling, but in this case claimant Republic owns respondent Banco and, in view of the ultimate decision herein, it is not necessary to base any conclusions on the fact that the vessel is not owned by respondent. Nevertheless, the fact that claimant Republic has been and still is claiming sovereign immunity for the vessel is a factor which militates against counter-security, since such claim might have eliminated libelant's security, if claimant had prevailed in its plea, and may still do so if the Secretary of State suggests that the vessel is immune from execution.

Another factor in this case in the presence of the intervening libels. No counterclaim has been made against intervening libelants, and they cannot be required to give security. So long as their claims are undisposed of, the Court could not properly release the vessel to claimant, unless claimant or respondent gives security, which neither of them has ever been willing to do.

Under all the circumstances the Court concludes that it should exercise its discretion against requiring libelant to post counter-security, and against releasing the vessel to claimant for lack of such counter-security.

Proctors for respondent Banco and claimant Republic concede that whether a Court should enter an order directing the judicial sale of a vessel under Admiralty Rule 12 is discretionary with the Court. They rely principally upon their claim of sovereign immunity, which has been denied by the Fourth Circuit, 335 F. 2d 619, and implicitly by the Supreme Court in denying the motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus, 380 U. S. 970. It is true, as respondent and claimant argue, that if the Secretary of State should suggest to the Court that the M. V. Ciudad de la Habana is immune from execution, such suggestion would be binding upon the Court. But the Secretary has refrained from taking such action. See discussion in footnote 10, 335 F. 2d at 623-624.

Admiralty Rule 12 provides:

> "Where any ship shall be arrested, the same shall, on the application of the claimant, be delivered to him either on a due appraisement, to be had under the direction of the court, or on his filing an agreement in writing to that effect signed by the parties or their proctors of record, and on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation for

like amount, with sufficient sureties, or an approved corporate surety, conditioned as provided in the foregoing rule; and if the claimant shall unreasonably neglect to make any such application, then the court may, on the application of either party, on due cause shown, order a sale of such ship, and require the proceeds thereof to be brought into court or otherwise disposed of."

The principle was established many years ago that "where claimant refuses to make a deposit or make stipulation for the vessel's release, and there is a general deterioration of the vessel, a sale will be ordered. The Willamette Valley (D. C.), 63 Fed. 130." *The Owego*, W. D. Wash., 289 Fed. 263, 266 (1923).

Claimant Republic argues that in view of its continuing claim of sovereign immunity, it was under no obligation to cause the release of the vessel, by stipulation or deposit; that it has not unreasonably neglected to make such application for the release of the vessel; but on the contrary, that libelant has been guilty of laches in delaying six years before seeking the sale of the vessel and in failing to prosecute this suit.

The facts do not support this argument. The claim for immunity has been denied, and claimant has still made no application for release of the vessel by stipulation or deposit. Libelant has not been guilty of laches, as suggested by claimant; the delays have been caused by respondent and claimant and by libelant's acceding to their repeated requests for further time to obtain instructions from their clients.

In view of the danger of serious deterioration of the vessel, and of danger to other vessels in the harbor, the M. V. Ciudad de la Habana should be sold.

The same considerations and authorities which show that the vessel should be sold show that the Marshal

should not be required to restore the vessel, nor to post or obtain from libelant a bond to secure such restoration, nor to release the vessel to claimant.

Counsel should agree upon a proper order.

(Signed) ROSZEL C. THOMSEN,
Chief Judge, U. S. District Court.

APPENDIX C

Opinion of the District Court, 181 F. Supp. 301, on the Issue of Admiralty Jurisdiction

THOMSEN, *Chief Judge.*

The amended libel of Flota Maritima Browning de Cuba, S.A., (Libelant), in rem against the motor vessel Ciudad de la Habana, her motors, tackle, etc., and in personam against Banco Cubano Del Commercio Exterior (Banco), with a clause of foreign attachment, seeks damages for the alleged breach of two lease purchase contracts, each of which covered several vessels. Banco and the Ciudad de la Habana have filed exceptions and exceptive allegations and a motion to decline jurisdiction, contending: (A) that the contracts are nonmaritime, and therefore this court, sitting in admiralty, has no jurisdiction over the subject matter; (B) that because of the appointment of an Interventor for Libellant by the Cuban Minister for the Recovery of Misappropriated Property, its officers had no authority to file the libel; and (C) that this court should decline jurisdiction because both of the parties are Cuban corporations and have agreed to the exclusive jurisdiction of the courts of the City of Havana.

FACTS

Respondent Banco is an autonomous credit institution, chartered under the laws of Cuba. A majority of its stock is owned by the Republic of Cuba, and it is controlled by the government. The purpose of Banco was and is to lend money and extend credit to promote Cuban trade.

An affidavit of L. D. Browning, Vice-President and Treasurer of Libelant, shows that in furtherance of its program Banco contracted for the construction of four motor ships in an English shipyard and two in a Japanese

shipyard. It was originally contemplated that those vessels would be operated by the Cuban operators who were then operating five vessels already acquired by Banco, but they did not prove satisfactory. As a result, Dalpha Line, a company wholly-owned by Banco, took over the vessels from the private operators.

Banco and Dalpha Line were anxious that the vessels be operated by an experienced operator and asked a marine surveyor who had performed services for the Cuban Merchant Marine to recommend such a firm. He got in touch with T. H. Browning and L. D. Browning, operators of Browning Lines, Inc., who thereupon entered into negotiations with Banco.

As a result of those negotiations, Libelant was incorporated as a Cuban corporation on April 8, 1958. Almost all of its stock is owned by T. H. Browning, a citizen of the United States, residing in Michigan. Its principal office is in Havana, but it also has offices in Detroit, Toronto, Montreal, and Halifax.[1]

On or about May 3, 1958, in Havana, Libelant and Banco entered into a lease-purchase contract (the English contract), which provided for the lease by Banco to Libelant of the six vessels then being constructed for Banco in English and Japanese shipyards, and contained certain provisions for the operation of the vessels by Libelant similar to those customarily contained in bareboat charters. The period of the lease was fifteen years from the delivery date of each vessel. However, the contract granted to Libelant an option to purchase the vessels and to apply against the purchase price all rental payments theretofore made, which at the end of the term would equal or exceed the agreed price, and granted to Banco the right to have the

[1] As permitted by its charter. However, under Cuban law, a Cuban corporation is required to file a certificate disclosing all branch offices, and Libelant has registered no branch office.

contract canceled and superseded by a contract of sale with a marine mortgage. Libelant was also entitled at any time to terminate the contract without penalty or liability, except satisfying any liens against the vessels, returning the equipment shown on the inventory, and paying any amounts then due under the contract; in such event Banco would have no right to claim from Libelant any amounts not yet due under the terms of the contract. The contract required that during the life of the charter the ships sail under the Cuban flag and have Cuban crews, and that Libelant establish service between Cuban ports and ports of the United States and Canada. It also contained a provision which has been translated as follows: "The parties hereto, waiving whatever other jurisdiction they may have by reason of any other domicile, appoint the City of Havana and its judges and courts to take cognizance of all matters or pleadings, whether judicial or extra-judicial, that may arise from, or be a consequence of, the present contract."

Soon after the English contract was executed Browning heard that Canadian National (West Indies) Steamships, Ltd., was considering the sale of eight of its vessels which were then idle because of a strike. Browning advised Banco of the availability of those vessels. Banco expressed interest and asked Browning to make a survey of them. After that had been done, Banco determined to purchase the vessels. They were purchased by Banco in Montreal on August 19, 1958, and on the same day, in Montreal, Libelant and Banco entered into another lease-purchase contract (the Canadian contract), which provided for the lease by Banco to Libelant of the eight vessels which had just been purchased by Banco from Canadian National [2] and three other vessels, the Rios vessels, already owned by

[2] For a period of seven years from the date each started operating.

Banco.[3] It contained provisions similar to those contained in the English contract.[4]

The amended libel alleges that pursuant to the English lease-purchase contract the Steamship Pinar Del Rio was delivered to Libelant by Banco on or about October 17, 1958, and remained in Libelant's service under that contract until about January 6, 1959, when Banco wrongfully retook possession of the vessel; that Banco has refused to redeliver the vessel to Libelant and has failed and refused to perform its obligations under the contract with respect to the other vessels covered thereby; and that Libelant has suffered $33,000 damages for "expenditures incurred in the performance of the lease provisions alone", and will suffer damages estimated at upwards of $4,000,000 "for loss of profits which would have been realized solely from the leased operation of such vessels".

The amended libel also alleges that pursuant to the Canadian lease-purchase contract the three Rios vessels were delivered by Banco to Libelant on or about September 15, 1958, and that the Ciudad de la Habana (one of the Canadian vessels, formerly known as M/S Canadian Challenger) was delivered on or about August 19, 1958; that the performance of that contract was begun and continued

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[3] For a period of seven years from the date when such vessels were delivered.

[4] The Board of Directors of Banco, in authorizing this contract, adopted the following resolution: "To purchase from the Canadian National (West Indies) Steamships Limited, for resale to Flota Maritima Browning de Cuba, S.A., eight ships * * * (f) That as a compensation for the Bank's financing of the purchase of these ships, the Flota Maritima Browning de Cuba, S.A., purchase from the Bank under similar conditions and terms, the three ships owned by the Bank named 'Rio Damuji', 'Rio Canonao' and 'Rio Jibacoa', and that this transfer agreed to, be included in the same lease and purchase contract to be entered into with the Flota Maritima Browning de Cuba, S.A., for the purchase of the eight ships." The Board of Directors of Libelant referred to the transaction as a lease.

until breached by Banco on or about October 30, 1958; that Libelant has performed the conditions, duties and obligations imposed upon it by the Canadian lease purchase contract, but that Banco has refused and continues to refuse to perform that contract with respect to either the Ciudad de la Habana or the other vessels covered thereby; that Libelant has suffered $30,000 damages "for expenditures incurred in the performance of the lease provisions alone of the Canadian Lease-Purchase Contract with respect to the Ciudad de la Habana, and $190,000 for expenditures incurred in the performance of the lease provisions alone of such contract with respect to the other Canadian and Rios vessels, and will suffer damages for loss of profits which would have been realized solely from the leased operation of such vessels in the amount of $223,000 with respect to the Ciudad de la Habana and $3,277,000 and upwards with respect to the other Canadian and Rios vessels."

The Ciudad de la Habana is now in the port of Baltimore, Maryland, where it was seized and attached by the United States Marshall under process issued out of this court on June 22, 1959, pursuant to the prayers of the original libel filed herein.

Meanwhile, on January 2, 1959, as a result of a revolution led by Fidel Castro Ruz, a provisional government was proclaimed as the government of Cuba. The United States recognized this government on January 7, 1959.

On January 26, 1959, Commander Andres Gonzalez Lines, M.N., came to Libelant's office in Havana, bearing a resolution of the Minister in Charge of the Recovery of Misappropriated Property, Dr. Faustino Perez Hernandez, dated January 22, 1959, which has been translated as follows: "*Resolution: Whereas:* It is the duty of the present Government of the Republic urgently to adopt the necessary measures to facilitate the free development of work centers and to orient the economic and social activities, among which maritime transportation holds an

important place. *Whereas:* From the data in possession of the Government it appears that the steamship companies entitled 'Isla De Pinos, S.A.' and 'Navegacion Dalpha, S.A.' belong to well known persons connected with the past dictatorial regime of which they were true beneficiaries, said companies having been acquired by means which are assumed to have come from misappropriations of public funds, as a consequence of which that assumption must be established in an indubitable manner. *Whereas:* To achieve the above mentioned purposes it is necessary to order the intervention of the shipping companies entitled 'Isla De Pinos, S.A.', 'Navegacion Dalpha, S.A.' and 'Browning De Cuba, S.A.' with all their vessels, offices, dependencies, tangible and intangible properties as well as their banking assets and liabilities so that they may renew their work and services as soon as possible, and to this purpose all the officers and employees of the said companies should be placed under the administrative control of the Interventor aforementioned, whose name will be given, who may remove or substitute them freely. Therefore, in use of the power vested in me, I have resolved: First: To order the intervention of the steamship companies entitled 'Isla De Pinos, S.A.', 'Browning De Cuba, S.A.' and 'Navegacion Dalpha, S.A.' together with all their vessels, dependencies, tangible and intangible properties as well as their banking assets and liabilities; their officers and employees being placed under the administrative control of the Interventor. Second: To appoint Commander Andres Gonzales Lines, Interventor of the steamship companies entitled 'Isla De Pinos, S.A.', 'Browning De Cuba, S.A.' and 'Navegacion Dalpha, S.A.' vested with such powers and authority as may be necessary to operate on a normal basis the business of said companies and the operation of their vessels, with power to contract in court and out of court, and to enter into any kind of commercial or banking operation for the exercise of said

powers and authority he may discretionally delegate in other persons, and he is likewise vested with power to remove, suspend and appoint the personnel for the better carrying out of the mission to him entrusted, informing this Ministry as soon as possible of the matters with which he has been charged."

Lines delivered the Resolution to Alfredo Cristobal Duarte y Segurola, Libelant's executive vice-president and general manager, who "rejected" the second "Whereas" clause of the Resolution and stated that Libelant (Browning de Cuba, S.A.) does not belong to "well known persons connected with the past dictatorial regime", but agreed to bring the intervention to the attention of Libelant's board of directors. Lines asked Duarte about the assets and liabilities of the corporation, demanded a general balance sheet, and "in the use of the powers to him granted" appointed Abelardo Pujol Barrera, a captain in the Merchant Marine, to represent him in the intervention with the same powers vested in the interventor.

Respondents have offered nothing to support the statements contained in the Resolution, nor have they shown any source of the claimed "power vested in" the Minister in Charge of the Recovery of Misappropriated Property, except a reference to Law No. 78, proclaimed on February 13, 1959, as the organic law of the Ministry for the Recovery of Misappropriated Properties by Manuel Urrutia Lleo, then President of the Republic of Cuba.[5]

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[5] No copy of Law No. 78 was offered in evidence or presented to the court. It was agreed, however, that it contained the following provision: 'The present law has retroactive effect, due to the nature of the purposes pursued, all of which are of public interest, social benefit and national necessity, and in view of the urgency to reimburse to the National Treasury the proceeds of misappropriations, frauds and other criminal schemes carried on to its prejudice. * * * All acts and resolutions adopted by the Minister of the Recovery of Misappropriated Properties to carry out the same purposes of this law, prior to its date, are hereby ratified."

Appendix C—Opinion of the District Court, 181 F. Supp. on the Issue of Admiralty Jurisdiction

The unfriendly attitude of the new government to the United States has increased during the "Year of the Revolution", and the government has repeatedly taken over private property without any kind of court authority. As recently as January 11, 1960, the United States Government protested the seizure and occupation without court order of land and buildings owned by citizens of the United States.[6]

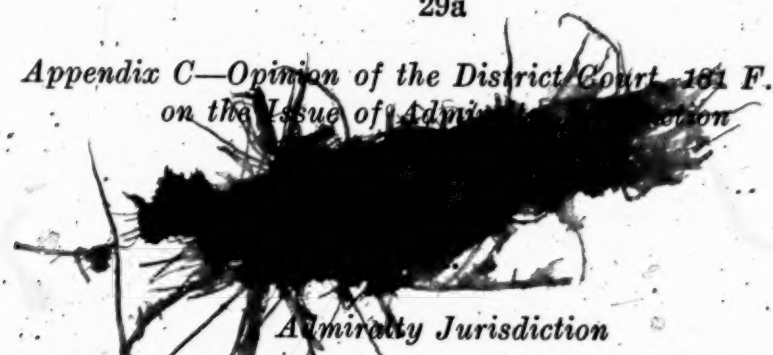
Since Law No. 78 was proclaimed on February 13, 1959, it does not appear that it provided any authority for the Resolution of the Minister on January 22, 1959, whatever authority it may be for the continuance of the intervention. Later in 1959, "the Year of the Revolution", Dr. Urrutia was removed as President of the Republic for failure to proclaim decrees desired by Castro.

[6] Following is the text of a statement issued on January 11, 1960, by the State Department describing its note to Cuba on seizures of property of United States citizens:

"Ambassador Phillip W. Bonsal, who returned to Havana on Sunday, delivered today to the Ministry of Foreign Relations a note prepared in the Department of State during the Ambassador's period of consultation in Washington protesting to the Government of Cuba the numerous actions taken by officials of that Government which are considered by the United States Government to be in denial of the basic rights of ownership of United States citizens in Cuba—rights provided under both Cuban law and generally accepted international law.

"The actions in question involved principally the seizure and occupation of land and buildings of United States citizens without court orders and frequently without any written authorization whatever, the confiscation and removal of equipment, the seizure of cattle, the cutting and removal of timber, the plowing under of pastures, all without the consent of American owners. In many cases no inventories were taken nor were any receipts proffered nor any indication afforded that payment was intended to be made. These acts have been carried out in the name of the National Agrarian Reform Institute.

"(A case was cited in which a Marine dredge and a tugboat under United States registry, valued at approximately $500,000, were seized without any written authorization, inventory or receipt.)



Admiralty Jurisdiction

Respondents contend: (1) that admiralty has no jurisdiction over contracts for the sale of a ship; (2) that the lease-purchase agreements are essentially contracts of sale; that the provisions for preliminary leasing are inseparable from the provisions for sale; and, therefore, admiralty has no jurisdiction of any of Libelant's claims.

(1)

Contracts of Sale

Respondents' first proposition—that admiralty has no jurisdiction over contracts for the sale of a ship—is generally accepted in the United States but has been criticized and regarded as anomalous.[7] Neither the Supreme Court nor the Fourth Circuit has passed on the question, and

"Several of these cases have been previously brought to the attention of the Government of Cuba by the Embassy of the United States but without result. Nor have the direct protests of the interested parties been fruitful.

"The United States Government, in its notes of June 11 and Oct. 12, 1959, to the Government of Cuba, expressed its full support of soundly conceived programs for rural betterment, including land reform. This support has been demonstrated by United States assistance given such programs in many countries. However, the United States Government at the same time expressed its firm belief that their attainment is not furthered by the failure of the Government of Cuba to recognize the legal rights of United States citizens who have made investments in Cuba in reliance upon the adherence of the Government of Cuba to principles of equity and justice." The New York Times, January 12, 1960.

[7] Gilmore and Black, The Law of Admiralty, pp. 24-25; Admiralty Jurisdiction and Ship-Sale Contracts, 6 Stanford Law Review 540.

there are few cases in other federal courts directly in point. The historical basis for the claimed rule is confused.[8]

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[8] Art. III, sec. 2, of the Constitution extends the judicial power of the United States to "all Cases of admiralty and maritime Jurisdiction". The Judiciary Act of 1789, sec. 9, implemented this grant by providing that the district courts should have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. See 28 U. S. C. A. § 1333.

At the time the Constitution was adopted, the jurisdiction of the British Court of Admiralty was limited by the "locality test", as a result of its conflict with the common law courts. On the other hand, the jurisdiction of the colonial courts of vice-admiralty had not been so limited, but had been similar to the broad jurisdiction exercised by other maritime courts throughout the shipping world, applying the "subject matter test" of the civil law in deciding what contracts were within the admiralty jurisdiction. For many years the courts of the United States were in hopeless confusion as to what was intended by the relevant provisions of the Constitution and of the Judiciary Act. The prevailing rule became the rule stated by Justice Story in DeLovio v. Boit, C. C. D. Mass., 7 Fed. Cas. page 418, No. 3,776, namely, that the jurisdiction "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea." 7 Fed. Cas. at page 444. This rule was followed in the landmark case of Insurance Co. v. Dunham, 1871, 11 Wall. 1, 20, L. Ed. 90, where it was held that whether a contract was "maritime or not maritime depended, not on the place where the contract was made, but on the subject matter of the contract. If that was maritime, the contract was maritime. This may be regarded as the established doctrine of the court." 11 Wall. at page 29.

The English locality test had been repudiated with respect to contracts in a number of earlier cases, e.g. New Jersey Steam Navigation Co. v. Merchants' Bank, 1848, 6 How. 344, 12 L. Ed. 465, and Morewood v. Enequist, 1860, 23 How. 491, 16 L. Ed. 516, which held that charter parties and contracts of affreightment are maritime contracts, cognizable in courts of admiralty by process either in rem or in personam.

Appendix C—Opinion of the District Court, 181 F. Supp. on the Issue of Admiralty Jurisdiction

The Supreme Court has held that admiralty has no jurisdiction to grant specific performance of an alleged con-

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Meanwhile, however, the Supreme Court had held, in People's Ferry Co. of Boston v. Beers, 1857, 20 How. 393, 15 L. Ed. 961, that a contract to build a ship is not a maritime contract. The Court gave a number of reasons for its decision, one of which seemed to hark back to the English "locality test". Peoples Ferry Co. of Boston v. Beers was discussed in Moorewood v. Enequist and Insurance Co. v. Dunham. In Moorewood v. Enequist the Court said that the arguments used in stating the opinion of the Court in People's Ferry Co. of Boston v. Beers "must be referred to the subject before it, and construed in connection with the question to be decided. They have no reference whatever to any former decisions of this Court on the question now (it is hoped for the last time) mooted before us." 23 How. at page 495. In Insurance Co. v. Dunham, the Court said that Peoples Ferry Co. of Boston v. Beers should be "construed in connection with the precise question before the Court; in other words, that the effect of that decision was not to be extended by implication to other cases." 11 Wall. at page 28.

In Thames Towboat Co. v. The Francis McDonald, 254 U. S. 242, 41 S. Ct. 65, 66, 65 L. Ed. 245, the Court followed Peoples Ferry Co. of Boston v. Beers, but said: "Nowithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water."

In New Bedford Dry Dock Co. v. Purdy, 258 U. S. 96, 42 S. Ct. 243, 244, 66 L. Ed. 482, a repair case, where it was argued that the same rule should be applied in repair cases as in construction cases, the Court refused to do so, saying: "It is not always easy to determine what constitutes repairs as opposed to original construction. A contract for the former, is maritime; if for the latter, it is not. We are not disposed to enlarge tht compass of the rule approved in Thames Towboat Co. v. The 'Francis McDonald', under which contracts for the construction of entirely new ships are classed as nonmaritime, or to apply it to agreements of uncertain intendment —reasonable doubts concerning the latter should be resolved in favor of the admiralty jurisdiction."

tract of sale of a vessel, saying: "While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance * * * The jurisdiction embraces all maritime contracts, torts, injuries, or offenses and it depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation." Rea v. The Eclipse, 135 U. S. 599, at page 608, 10 S. Ct. 873, at page 876, 34 L. Ed. 269.

In The Ada, 2 Cir. 250, F. 194, reversing D. C. D. N. Y., 239 F. 363, the charter of a vessel gave the charterer an option to purchase for the sum specified in the charter party as the hire. The owner withdrew the vessel, and the charterer filed a libel in rem against the vessel and in personam against the owner to recover damages sustained by the charterer, both for breach of the charter and for breach of the contract of sale. The owner filed exceptions to the libel, on the ground that the damages claimed arose from a breach of contract for the sale of the vessel, which was a cause of action not within the admiralty jurisdiction. 250 F. at page 195. Judge Smith,[9] for reasons of jurisdiction, in effect severed the two causes of action, and the claim based upon the anticipatory breach was pursued in an action at law. 239 F. at page 372, 250 F. at page 195. The cause of action for breach of the charter provisions came on before Judge Learned Hand, sitting in admiralty. Judge Hand found that the owner had wrongfully withdrawn the vessel, and was liable to the charterer for the loss sustained by it as charterer, although the damages for breach of the sale provisions were not recoverable in admiralty. 239 F. at page 372, 250 F. at page 195. The Court of Appeals reversed, on the ground that the District

[9] Evidently Judge H. A. M. Smith of the Eastern District of South Carolina, an experienced admiralty judge.

Court lacked jurisdiction. Each of the appellate judges filed an opinion. Without the citation of any authority whatever, they agreed that a contract for the sale of a ship is not a maritime contract; they seemed to agree, each for different reasons, that the charter provisions and the sale provisions were inseparable, and that the contract should be treated as a contract of sale.

[1] The Ada was followed in Rivara v. James Stewart & Co., 119 Misc. 73, 195 N. Y. S. 841, and in Grand Banks Fishery Co. v. Styron (The Caracara), D. C. S. D. Me., 114 F. Supp. 1.[10]

The Guayaquil, D. C. E. D. N. Y., 29 F. Supp. 578, and other cases have followed Rea v. The Eclipse in holding that an admiralty court has no jurisdiction to grant specific performance of a contract to purchase a vessel.

Should Contracts of Sale Be Considered Maritime Contracts?

[2] Although it is firmly established by reason and authority that admiralty has no jurisdiction to grant specific performance of a contract to purchase a vessel, it does not necessarily follow that all contracts of sale are non-maritime. Admiralty courts pass on questions of title in petitory and possessory libels not calling for specific performance.

There are valid arguments in favor of the proposition that admiralty courts should take jurisdiction over claims arising out of contracts for the sale of a ship, though not for specific performance of contracts of sale, and even stronger arguments for taking jurisdiction over claims arising out of lease-purchase contracts. For example, admiralty courts are generally familiar with the subject matter

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[10] Since it is agreed that admiralty has jurisdiction of contracts for repair of a vessel, and repairs give rise to a maritime lien, the decision in The Caracara seems particularly anomalous.

of such contracts and with the related questions which frequently arise; admiralty procedure is usually more flexible and speedier than state court procedure in comparable cases; the admiralty rules with respect to attachment, release on stipulation, and the like, are uniform throughout the country and are well known to admiralty lawyers, whereas the attachment laws and practices of the several states are very different and are ill-adapted to cases involving vessels engaged in navigation, where seamen, cargo owners and others may have all sorts of conflicting claims and liens, which admiralty courts and the admiralty bar are accustomed to handle.

The traditional subject matter test—whether the contract relates to the navigation, business or commerce of the sea—would seem to be met by contracts for the sale of a ship. Even the more restrictive statement of the test—whether the contract concerns transportation by sea, or is one of navigation and commerce within navigable waters—is met by the lease provisions of the typical lease-purchase contract, including the contracts involved in this case.

I conclude that it would be desirable for admiralty courts to take jurisdiction over claims arising out of contracts for the sale of ships, and even more desirable for them to take jurisdiction over claims arising out of lease-purchase contracts. Such contracts seem to be maritime contracts under the tests generally applied by the Supreme Court.

But it is not necessary for me to decide in this case whether a simple contract for the sale of a ship is maritime or not. The contracts in this case are lease-purchase contracts, and for the reasons set out below, I have concluded that the provisions of the lease-purchase contracts under which the claims alleged in the libel arise are separable from the sales provisions of those contracts, and that some at least, of the alleged claims are maritime claims.

Appendix C—Opinion of the District Court, 181 F. Supp. on the Issue of Admiralty Jurisdiction

(2)

Separability

[3] The lease-purchase contracts involved in the instant case provide for the leasing—essentially bareboat chartering—of the vessels for fifteen years under one contract, seven years under the other, with certain options to the lessee and to the owner respectively. The contracts give the lessee two options, which may be exercised at any time: (a) to terminate the lease without further obligations, and (b) to purchase the ships, and to apply on account of the purchase price the payments theretofore made for rental or charter-hire. The owner's options are (a) to convert the contract into a sale with mortgage, and (b) to terminate the contract in the event of a default. If the several contracts had run to nearly their full course, the lessee would undoubtedly have exercised its option to purchase, because the payments for rental or charter-hire would have nearly equalled the purchase price. But many events might have occurred in the early part of the term to cause the lessee to terminate the contract.

The contracts in the instant case are therefore different from the contract in The Ada, which ran for only six months and gave no similar termination option to the lessee. Yet two experienced admiralty judges, Judge Smith and Judge Hand, held in that case that the charter provisions of the lease-purchase contract were within the admiralty jurisdiction, although they were reversed by the Second Circuit, for different reasons stated by the several judges. Moreover, the overlapping feature of The Ada decision is not involved in this case.

Robinson on Admiralty, p. 186, says: "Whether mixed contracts, those partly non-maritime, are dealt with in toto by the admiralty courts is a question on which there is a lack of clarity. There is judicial talk that for admiralty jurisdiction the contract must be 'wholly maritime'.

But the cases show that the maritime aspects, if a substantial part of the whole contract, may be litigated in the admiralty courts if they are separable." Gilmore and Black, The Law of Admiralty, pp. 25-26, refers to mixed contracts as one of the "doubtful areas", and discusses the cases on p. 26, n. 95.

In Compagnie Francaise De Navigation a Vapeur v. Bonnasse, 2 Cir., 19 F. 2d 777, 779, certiorari denied American Exchange Irving Trust Company v. Bonnasse, 275 U. S. 551, 48 S. Ct. 114, 72 L. Ed. 421, Judge Learned Hand, this time speaking for the Second Circuit, said: "A contract both maritime and nonmaritime is ordinarily indivisible, so that the rights of the parties cannot be adjusted separately, those maritime in the admiralty, and the rest elsewhere. Admiralty must refuse to assume any jurisdiction over it at all, because it must either ignore the principles of the law of contract, or extend its powers beyond their constitutional scope. But in so far as the maritime obligations may, consistently with those principles, be separately adjudicated, there is no objection to the jurisdiction of the admiralty pro tanto. This is clearly intimated in Turner v. Beacham, Fed. Cas. No. 14,252, and The Pennsylvania, 2 Cir., 154 F. 9, though the decisions did not require such a holding. The mere fact that the contract covers a subject-matter of both kinds is not therefore decisive; that would make the mere form control. The substantial question is whether the maritime obligations can be separately enforced without prejudice to the rest."

In the instant case several of the vessels had been delivered to Libelant under the English and Canadian contracts, respectively. Some of the claims asserted in the libel (as particularized in the exhibits attached to Browning's affidavit) with respect to *those* vessels are clearly maritime in character, and are properly asserted in *personam* against Banco in the amended libel. The claims

for expenditures incurred in the performance of the lease provisions of the Canadian contract with respect to the Ciudad de la Habana are properly asserted *in rem* against that vessel and *in personam* against Banco.

Other claims are based upon the allegation that Libelant will suffer damages for loss of profits which would have been realized solely from the leased operation of the Ciudad de la Habana and the other vessels, delivered and not delivered. None of those claims can be asserted *in rem*, Gilmore and Black, op. cit., p. 520 et seq.;[11] it is not necessary to decide at this time to what extent those claims can be asserted in this proceeding.

B.

The Interventor

[4] The appointment of an "interventor" for Libelant under the circumstances set out in the statement of facts, above, does not prevent the proper officers of Libelant from bringing this suit on its behalf in a court of the United States. There was no court proceeding in Cuba. There was no statute or other law justifying the appointment until the proclamation of Law No. 78, which attempts to justify, ex post facto, seizures theretofore made by the Minister for the Recovery of Misappropriated Properties.

The Resolution appointing the interventor did not even attempt to set out any facts justifying the appointment of an interventor for Libelant (Browning de Cuba, S. A.), such as were recited in support of the appointment of an interventor for the two other shipping companies referred to in the Resolution. Respondents have shown no such facts, and have cited no authority to support their excep-

[11] See also Acker v. The City of Athens, 4 Cir., 177 F. 2d 961; Archawaski v. Hanioti, 350 U. S. 532, 76 S. Ct. 617, 100 L. Ed. 676.

tions to the libel on the ground that it was not properly brought, or not properly supported by the affidavit of Libelant's Vice-president.

C.

Should This Court Decline Jurisdiction?

[5] "Admiralty courts * * * have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless, 'the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum'." Langnes v. Green, 282 U. S. 531, 544, 51 S. Ct. 243, 248, 75 L. Ed. 520, quoted in Canada Malting Co. v. Paterson Co., 285 U. S. 413, 420, 52 S. Ct. 413, 76 L. Ed. 837. The question has most frequently been presented in suits by foreign seamen against masters or owners of foreign vessels, relating to claims for wages and like differences, or to claims of personal injury. See e. g. Lauritzen v. Larsen, 345 U. S. 571, 73 S. Ct. 921, 97 L. Ed. 1254; The Fletero v. Arias, 4 Cir., 206 F. 2d 267, 270, certiorari denied 346 U. S. 897, 74 S. Ct. 220, 98 L. Ed. 398. The factors which govern the decision are discussed in Canada Malting Co. v. Paterson Co., supra, and in Gulf Oil Co. v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055.

[6] As is usual in such cases some factors in the instant case look one way, some the other. Both parties are Cuban corporations; Libelant was incorporated in order to obtain the contracts in suit, which deal with ships which were or became part of the Cuban merchant marine. One contract was made in Cuba, the other in Canada. These facts would ordinarily weigh heavily in favor of this court's refusing jurisdiction, even though most of Libelant's stockholders and directors are citizens and residents of the United States. The situation in Cuba

today, however, is far from ordinary; it is very doubtful whether Libelant can hope to receive justice in Cuba. That is the dominant factor to be considered in every case when such doubt exists.

[7, 8] In both contracts the parties assented to the jurisdiction of the Havana courts and agreed to waive all other jurisdiction, but that fact is not controlling in this case. The Supreme Court has left open the question of the effect of such an agreement on the jurisdiction of courts of the United States. The Monrosa v. Carbon Black Export, Inc., 359 U. S. 180, 79 S. Ct. 710, 3 L. Ed. 2d 723. The weight of authority, exemplified by Wm. H. Muller & Co., Inc. v. Swedish American Line, 2 Cir., 224 F. 2d 806, 56 A. L. R. 2d 295, holds that "in each case the enforceability of such an agreement depends upon its reasonableness * * * the parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented." 224 F. 2d at page 808. In that case, while refusing jurisdiction in favor of Swedish courts, the Second Circuit noted: "There is no contention that the Swedish courts are not capable of adjudicating this case fairly and justly." In the setting of the case at bar, it would be unreasonable and unjust to relegate Libelant to a Cuban forum.

CONCLUSION

Respondents' exceptions are hereby overruled.